Supreme Court, U.S.
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No. 91-1213

In The

Supreme Court of the United States

October Term, 1991

LARRY FLYNT; ALTHEA FLYNT; L.F.P., INC.; LARRY FLYNT PUBLICATIONS; HUSTLER MAGAZINE INC.; FLYNT DISTRIBUTING CO.; FLYNT SUBSCRIPTION CO.; LFZ, LTD.; ISLAND DISTRIBUTING, INC.; DAVID KAHN; JIM GOODE; DOUG OLIVER; N. MORGEN HAGEN; LONN M. FRIEND; INLAND EMPIRE PERIODICALS and PARK PLACE MARKET, INC.,

Petitioners,

vs.

GERRY L. SPENCE and THE SPENCE FOUNDATION FOR PEOPLE'S ATTORNEYS, INC.,

Respondents.

Petition For A Writ Of Certiorari To The Wyoming State Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ISSUES PRESENTED

1. When Petitioners published statements in a national magazine stating that Gerry Spence, an attorney, was "eager to sell out [his] personal values, truth, justice and our hard-won freedoms for a chance to fatten [his] wallet", and that he filed a civil lawsuit for a private client out of "*greed*" and as both a "nuisance suite" and a "publicity-grab", does the First Amendment of the United States Constitution require dismissal of the resulting defamation action?

2. Does the First Amendment bar a jury from determining whether Petitioners' statements about Gerry Spence implied to a reasonable reader underlying false statements of fact?

3. When the Wyoming Supreme Court held, as a matter of state civil procedure, that Gerry Spence's status as a public figure should be reconsidered by the trial court, does any provision of federal law bar such reconsideration?

4. When the record is devoid of evidence concerning the relevant facts to determine whether Gerry Spence qualifies as a public figure in this litigation, should the trial court be allowed to reconsider this issue?

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STATEMENT OF FACTS

Defendant Larry Flynt is an infamous pornographer who publishes *Hustler* magazine. The Ninth Circuit Court of appeals has described much of the contents of *Hustler* as "disgusting and distasteful abuse." *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 884 (9th Cir. 1988).

Three different monthly issues of *Hustler* published in 1984 contained relentlessly virulent attacks on Andrea Dworkin, a militant feminist opponent of pornography. Dworkin, an author of limited financial means, could not protect herself from *Hustler's* attacks except by filing suit. Through Gerry Spence and his law firm, Spence, Moriarity & Schuster, Dworkin sued Hustler, Flynt, and others for libel and related torts on February 21, 1985.

As soon thereafter as publication deadlines would allow, *Hustler* and Flynt retaliated with the article which forms the basis of this suit. *Hustler* named Spence "Asshole of the Month" for July, 1985. The article labelled Gerry Spence as belonging to a group of lawyers "(whose main allegiance is to money) [who] are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets." [App. at a-5 (parenthetical in original).] It stated that "Gerry 'This Tongue for Hire' Spence is more interested in promoting his bank account than traditional values." [App. at a-7 through a-8.] Contradictorily, it also charged that the suit that Spence filed on behalf of Andrea Dworkin was a "publicity-grab" [App. at a-7], and that it was a "nuisance suit" [App. at a-8], while also accusing Spence of taking Dworkin's suit out of "*greed.*" [App. at a-8 (emphasis in original).]

Gerry Spence filed the current suit in state court in Wyoming stating claims for defamation against Flynt and numerous other defendants.[1] The trial court dismissed the complaint. The Wyoming Supreme Court reversed. Defendants object to the state supreme court's ruling, arguing that their statements do not make any assertions of fact and that this case should therefore be dismissed. They also argue that the Wyoming court should not remand the issue of Gerry Spence's status as a public figure to the trial court, since Spence earlier in the litigation had conceded public fixture status.

Hustler and Flynt ground the arguments in their petition for certiorari on arguably questionable dicta in the opinion. But the result reached by the Wyoming Supreme Court is correct under federal law and should not be reviewed by this Court.

The effects of the ruling are limited by the procedural status of the case – a decision reversing a motion to dismiss, the state supreme court's ruling is not the final word determining liability in the case, but merely holds that the case should be allowed to progress towards trial. The Wyoming court's ruling directing the trial court to reconsider Gerry Spence's status as a public figure is particularly preliminary, since that ruling merely directs the trial court to give consideration to an issue which had not previously been raised in the case.

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[1] The complaint also stated claims for intentional infliction of emotional distress, invasion of privacy and false light, and outrage.

Petitioners expend considerable effort attacking the reasoning of the Wyoming Supreme Court's decision. They are asking this Court to review *dicta* in a pretrial ruling in a state tort action. Review at this stage would deny Respondents and the courts the benefit of developing the record as the case goes through pretrial proceedings, trial, and appeal on the merits. Granting certiorari now would take from the Wyoming courts a chance to consider the issues presented in this case beyond the preliminary stage of a motion to dismiss. It is premature for this Court to hear this case at the present time.

ARGUMENT

I. Defendants have libeled Plaintiff Gerry Spence with statements which a reasonable reader could interpret as including false assertions of fact, and this is sufficient basis for a defamation action.

The ruling made by the Wyoming Supreme Court in this case – denying Defendants' motion to dismiss Plaintiff Gerry Spence's libel claims – is correct under *Milkovich v. Lorain Journal Co.*, 497 U.S. ___, 111 L.Ed. 2d 1, 110 S.Ct. 2695 (1990) and should not be reviewed by this Court. Under *Milkovich*, a defamation claim may be based on statements of opinion which a reasonable reader could interpret as making or implying an underlying statement of fact:

> If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either

> incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false statement of fact. Simply couching such statements in terms of opinion does not dispel these implications . . . *Id.*, 111 L.Ed. 2d at 17-18.

Petitioners' statements about Gerry Spence reasonably imply false statements of fact. The statements, in a national magazine, say that Plaintiff Gerry Spence was "eager to sell out [his] personal values, truth, justice and our hard-won freedoms for a chance to fatten [his] wallet . . . " This statement implies knowledge that Gerry Spence had made choices in his life indicating that he elevated a chance to earn money over personal values, a sense of justice, and civil rights. Similarly, Petitioners' statements that Spence was seeking publicity or acting out of greed in filing suit on behalf of Andrea Dworkin imply that they knew enough of the circumstances to determine that such motivations underlay Spence's decision to file that suit on behalf of that client.[2] Their statement that the suit failed by Spence on behalf of Andrea Dworkin was a "nuisance suit" also implies underlying facts, namely that the suit had no basis in law or fact and no chance of success. Such an accusation can also be understood to imply that the suit was motivated by a desire to force Defendants to incur the costs of defendant against frivolous litigation, or perhaps to settle merely to

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[2] Defendants cite cases holding that statements about someone's motivations cannot form the basis for a libel action. [Petition for Certiorari, at 18-19.] These cases, however, were decided prior to *Milkovich*, and rely on the theory that statements of opinion are completely protected under the First Amendment, which this Court rejected in *Milkovich*.

avoid such litigation costs. The reasonable reader could understand the "sting" of the article to accuse Spence of having evidenced values which ranked money and publicity over truth and justice.

Petitioners ask this Court to rule, as a matter of law, that no reasonable reader could infer false assertions of fact from Defendants' statements in the article. However, clearly the statements about Spence in the article at the least create a jury question as to how they would be understood by a reasonable reader. Under *Milkovich,* this is sufficient to defeat a motion on the pleadings. *See, Masson v. New Yorker Magazine, Inc.,* 501 U.S. ___, 115 L.Ed. 2d 447, 472, 111 S.Ct. 2419 (1991) ("We allowed the defamation action to go forward in (*Milkovich*), holding that a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false assertions as to factual matters.") *See also, Hustler Magazine v. Falwell,* 485 U.S. 46, 57 (1988) (jury found that statement could not reasonably be understood as describing actual facts or events, and thus statements not actionable).

Beyond *Milkovich,* Petitioners marshall little authority to warrant this Court taking jurisdiction over this case. Petitioners' arguments rely on a plethora of improper authorities which fail to establish a conflict between lower courts on an issue of federal law.[3] Defendants

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[3] Petitioners argue that this Court should grant certiorari because the Wyoming Supreme court's decision in this case purportedly conflicts with decisions of the Court of Appeals of Washington, the Court of Appeals of Minnesota, the Appellate

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throughout their petition rely on cases interpreting state common law of libel, rather than federal constitutional law. *E.g. Lester v. Powers,* 596 A.2d 65 (Maine 1991)[4] (discussing fact/opinion distinction in Main common law of libel).

Petitioners' argument that their article merely contained unactionable insults, [Petition for Certiorari, at 17-18], relies exclusively on cases interpreting state defamation law, not federal constitutional principles. *Bartow v. Smith,* 149 Ohio St. 301, 78 N.E.2d 735 (Ohio 1948) (opprobrious epithets are ordinarily not actionable under common law); *Bucher v. Roberts,* 595 P.2d 239 (Colo. 1979) (same – citing only Colorado caselaw); *Wainman v. Bowler,* 176 Mont. 91, 576 P.2d 268 (1978) (discussing only Montana libel law); *Curtis Publishing Co. v. Birdsong,* 360 F.2d 344, 348 (5th Cir. 1966) (discussing liability for epithets, citing state precedents).

Petitioners next argue that the First Amendment bars libel suits based on statements about Spence's motives. [*Id.* at 18-21.] In this argument, Petitioners first cite to cases employing a test for "defamatory statements of fact versus constitutionally protected statements of opinion"

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Court of Illinois, the United States District Court for the Central District of California, the United States District Court for the District of the Virgin Islands. [Petition for Certiorari, at 15-17.] Since none of these courts constitute a state court of last resort or a federal appellate court, conflict with which would form a basis for granting certiorari, this brief will not address these cases.

[4] Cited in the petition for certiorari as *Luster (sic) v. Powers,* 1991 Me. Lexis 195.

which was rejected by this Court in *Milkovich. E.g. Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986); *Woods v. Evansville Press Co.*, 791 F.2d 480 (7th Cir. 1986).[5] Petitioners then argue that the Wyoming court's decision here is inconsistent with the Restatement (Second) of Torts. The Restatement is not a source of federal law which would give this Court a basis for granting certiorari. [Petition for Certiorari, at 20-21.] Finally, Petitioners argue with *dicta* in the Wyoming Supreme Court's decision about the fair comment privilege. [*Id.*, at 22-23.]

None of this argument provides this Court with a proper basis for granting certiorari. When all these irrelevant authorities are disregarded, Petitioners' position fails for lack of authority.

II. The Wyoming Supreme Court decided, as a matter of state procedure, that the trial court should reconsider whether Plaintiff Gerry Spence is a public figure, and this Court should not interfere with this ruling at this time.

The Wyoming Supreme Court ruled that the trial court should *reconsider* whether Plaintiff Gerry Spence is a public figure for purposes of this litigation. There are

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[5] Defendants' defamatory statements here bear a remarkable resemblance to the proxy statements which this Court found actionable under Section 14(a) of the Securities Exchange Act of 1934 last term in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. ___, 115 L.Ed. 2d 929, 111 S.Ct. ___ (1991). In that case the Court found that statements about the board of directors' *motivation* for urging shareholders to approve a merger could be proven false by objective evidence. *Id.* 115 L.Ed. 2d at 945-48.

several reasons, both procedural and substantive, why this Court should not hear an appeal on this issue, and certainly not at this time.

The Wyoming Supreme Court's remand instructs the trial court to make a determination based on a full development of the facts relevant to this issue. The record does not contain all the facts on this issue, because before the trial court all the parties assumed that Gerry Spence was a public figure. If the Wyoming courts decide, as a matter of Wyoming civil procedure, to allow a reconsideration of this issue at this stage, such a decision is a matter of state law and presents no federal issue for this Court to consider.

Further, although Gerry Spence is a nationally renowned trial lawyer, it is not at all clear that he should be considered a public figure *with regard to the issues presented in this case.* The leading precedent on the question of when a libel plaintiff qualifies as a public figure is *Gertz v. Welch*, 418 U.S. 323 (1974). Coincidentally, *Gertz* was a case brought by a lawyer handling a newsworthy and politically charged case on behalf of a client. That case recognized two types of public figures, namely those who are public figures for all purposes and "limited purpose" public figures:

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an

> individual's participation in the particular controversy giving rise to the defamation.
>
> *Id.*, 418 U.S. at 352.

There is little evidence in the record of this case to show the extent of Gerry Spence's participation in the particular controversy giving rise to the defamation. Comparison with the facts of *Gertz* will make it clear that the record of this case is incomplete to make a determination on this issue.

In *Gertz*, the plaintiff was an attorney who the Court could find to have been active in community and professional affairs, serving as an officer of civic groups and professional organizations, and the author of several books and articles on legal subjects. *Id.*, 418 U.S. 351. Based on these findings, the Court concluded that this attorney, although well known in some circles, had achieved no general fame or notoriety in the community. *Id.*, 418 U.S. at 351-52. The Court also found that the attorney's participation in the controversy giving rise to the defamation "related solely to his representation of a private client." *Id.*, 418 U.S. at 352. He had not discussed that litigation with the press, and thus "plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.* Based on these facts, this Court found that the plaintiff in *Gertz* should not be considered a public figure for the purpose of that litigation. *Id.*

No such factual development of the record – about the amount of fame or notoriety that Gerry Spence has in the community, about whether he has participated in any controversy giving rise to the defamation beyond the

representation of a private client, about whether he has discussed any such issue with the press or engaged the public's attention prior to Defendants' defamatory statements – has occurred in the present case. The Wyoming Supreme Court found that the controversy here "involved Dworkin's fight against pornography." [App. at a-14.] That court was unable to find evidence in the record to support "Hustler's argument . . . that Spence has taken up the fight against pornography, thrust himself into the controversy as a public figure, and [that he] is therefore subject to response by persons taking the other side." [*Id.*] The Wyoming court quite properly found that Gerry Spence would only qualify as a public figure if he went beyond merely representing a client and "engaged in this controversy beyond the confines of the litigation . . . " [*Id.*] Such a holding is totally consistent with this Court's precedent in *Gertz, supra.*[6]

The Wyoming Supreme Court quite properly concluded that the courts should give careful consideration to the question of whether an attorney representing controversial clients in controversial cases is a limited purpose public figure. Such lawyers should not, by their involvement in such work, necessarily make themselves more vulnerable to libel by automatically gaining public figure status. Requiring lawyers to pay such a price for

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[6] Gerry Spence's response to an open-ended general request for admission to the effect that he was a public figure is not conclusive of the issues raised in the *Gertz* analysis. Of course, Gerry Spence was, and is, a public figure in the broad sense of the term. But his response did not constitute an admission that he injected himself into the pornography controversy.

such work could deter many lawyers from taking on such cases and – as the Wyoming Supreme Court found – harm clients who need representation by such a "skilled, capable, specialist" attorney. [App. at a-15.]

CONCLUSION

For all the above reasons, Respondents request this Court deny the Petition for Certiorari.

Respectfully submitted,

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